



BALLOT**PEDIA**

JUDICIAL DEFERENCE

**UNDERSTANDING THE PRINCIPLE OF
JUDICIAL REVIEW**

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Judicial deference: Understanding the principle of judicial review

Summary

The term deference refers to the administrative law principle by which courts are expected to defer to an administrative agency's interpretation of a statute or regulation when the legislative language is silent or ambiguous. Deference is widely regarded as a major factor in the expansion of administrative agency powers.

This document guides you through the history, application, and uncertain future of deference.

By the end of this reading you will have an understanding of the following concepts:

- What is deference in the context of the administrative state?
- Arguments for and against judicial deference
- Deference in the states and the future of deference

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Judicial deference: What is deference in the context of the administrative state?

Deference in action

Deference applies in cases of judicial review, e.g., when a plaintiff accuses an agency of unlawful action. In such cases, the court must decide whether the agency action in question was authorized.

Since Congress often passes broad legislation that requires agencies to fill in the details of rule making and enforcement, the degree of agency interpretation is a direct function of lawmakers' imprecision in crafting statutory language.

 **Read on:**
• [Deference](#)

Example: *City of Arlington v. FCC*

City of Arlington, Texas v. Federal Communications Commission (FCC) was a 2013 United States Supreme Court case that questioned whether courts should defer to an agency's interpretation of the extent of its own authority under a particular statute. The case questioned whether the Federal Communications Commission (FCC) had the legal authority to set time limits for local entities to approve zoning requests under the Communications Act of 1934. Plaintiffs argued that the statute did not explicitly authorize the agency to set time limits, while the FCC claimed that it had crafted a reasonable interpretation of an ambiguous provision of the Act. The court ultimately deferred to the FCC's interpretation of the Act, arguing that the power to set time limits fell within the agency's jurisdiction.

 **Read on:**
• [*City of Arlington v. FCC*](#)

Types of deference

The United States Supreme Court has developed several forms of deference in reviewing agency actions. The three most common forms of deference include Chevron deference, Skidmore deference, and Auer deference. Let's take a closer look at each of these deference doctrines:

Chevron deference: The *Chevron* doctrine is named for the 1984 case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, in which the United States Supreme Court established the legal test to determine whether a court should defer to an agency's reasonable interpretation of an ambiguous statute. Under *Chevron*, courts are expected to refrain from imposing their own statutory interpretation unless the agency's interpretation is determined to be unreasonable.

Read on:

- [Chevron deference](#)
- [Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.](#)
- [Antonin Scalia](#)

Skidmore deference: The Skidmore doctrine applies when a federal court yields to a federal agency's interpretation of a statute administered by the agency according to the agency's ability to demonstrate persuasive reasoning. Skidmore deference allows a federal court to determine the appropriate level of deference for each case based on the agency's ability to support its position. The United States Supreme Court developed Skidmore deference in the 2000 case *Christensen v. Harris County* and named the doctrine for the court's 1944 decision in *Skidmore v. Swift & Co.*

Read on:

- [Skidmore deference](#)
- [Christensen v. Harris County](#)
- [Skidmore v. Swift & Co.](#)

Auer deference: A federal court applies Auer deference, also known as *Seminole Rock* deference, when it yields to an agency's interpretation of an ambiguous regulation that the agency itself has promulgated. In order for a court to apply Auer deference, the underlying statute must be unclear and the agency's interpretation must be deemed reasonable. The United States Supreme Court first described the underlying rationale for Auer deference in the 1945 case *Bowles v. Seminole Rock & Sand Co.* The court went on to develop and implement the deference principle in the 1997 case *Auer v. Robbins*.

Read on:

- [Auer deference](#)
- [Bowles v. Seminole Rock & Sand Co.](#)
- [Auer v. Robbins](#)

Arguments for and against judicial deference

Deference and agencies

Supporters of deference claim that deference prevents non-expert judges from interfering with agency policy, which is crafted by staff who are presumed to be experts in their field. Supporters also claim that deference grants agencies more flexibility to solve problems; that chaos would ensue if courts were less deferential. Opponents argue that deference contributes to the expansion of agency powers by concentrating unchecked lawmaking power in agencies and facilitating what D.C. Circuit Judge Neomi Rao refers to as administrative collusion, which rewards agencies for working with individual members of Congress to further the expansion of agency powers through delegation.

Deference and delegation

Supporters of deference maintain that courts should defer to agency interpretations of unclear statutes because Congress has delegated the authority to interpret and implement the law to agencies. Opponents of deference argue that deference violates the nondelegation doctrine, creates a bias in favor of agencies, and prevents judicial review of agency actions.

Deference and the separation of powers

Deference supporters claim that the separation of powers—the distribution of government authority between the three branches—requires deference when the resolution of ambiguous statutes requires policy judgments. Since policy judgments are political questions, the argument follows, they must be resolved by the political branches (Congress and the president) rather than the courts. Deference opponents argue that deference violates the separation of powers by preventing the judicial branch from exercising independent judgement when interpreting statutes, transferring judicial power to the executive branch, and ignoring the judicial obligation to serve as a check on the political branches.

Read on:

- [Separation of powers](#)

Deference and legal precedents

Deference supporters contend that deference principles are supported by legal precedents demonstrating that courts have long accepted reasonable executive interpretations of statutes. Supporters of this argument also claim that the [Administrative Procedure Act \(APA\)](#), which governs agency procedures, allows for deference as part of judicial review. Opponents argue that deference breaks with both United States Supreme Court precedent, which favored de novo judicial review, and the APA, which calls for courts to decide relevant questions of law.

Read on:

- [Taxonomy of arguments about judicial deference](#)

Deference in the states and the future of deference

Deference in the states

At least thirty-six states have implemented forms of judicial deference to state administrative agencies similar to the federal deference doctrines discussed in the earlier installments. The following five states, however, have taken steps to limit or eliminate deference:

- **Wisconsin:** The Wisconsin Legislature in December 2018 codified the intent of a Wisconsin Supreme Court decision that eliminated judicial deference to state agencies.
- **Florida:** Voters in Florida approved a ballot measure in November 2018 that prohibited courts from deferring to state agency interpretations of rules in legal cases.
- **Mississippi:** The Mississippi Supreme Court issued a decision in June 2018 that ended judicial deference to state agencies.
- **Arizona:** Governor Doug Ducey (R) signed legislation into law in April 2018 requiring state courts to decide all questions of law without deference to government agencies.
- **Michigan:** The Michigan Supreme Court issued a decision in July 2008 that ended judicial deference to state agencies.

Read on:

- [State responses to judicial deference](#)

The future of deference

Judicial deference as a doctrine faces an uncertain future. Chevron deference, in particular, has been seen as "entering a period of uncertainty, after long seeming to enjoy consensus support on the Court," according to administrative law scholar Michael Kagan. What has emerged since 2015, according to Kagan, has been a period "in which it seems that the Court may be more willing to explicitly refine the doctrine, to limit its application in certain ways, and to articulate new exceptions."

Read on:

- [Chevron and a new period of uncertainty](#)

Deference reform proposals

Administrative law scholars and government officials have proposed various approaches to reforming deference. The following is a selection of reform proposals:

- **Legislative approaches:** The Separation of Powers Restoration Act (SOPRA) and the Regulatory Accountability Act (RAA) are two legislative proposals that would limit or eliminate judicial deference to agencies in cases where there is a dispute about the meaning of a statute or regulation.
- **Judicial approaches:** The United States Supreme Court could narrow the scope of Chevron deference by (1) declining to apply the doctrine to questions of economic and political significance, (2) applying a context-specific inquiry into congressional intent, and (3) improving the resolution of statutory ambiguity. The court could also narrow the scope of Auer deference to limit the ability of judges to defer to agencies' interpretations of their own regulations.
- **Executive approaches:** The executive branch could instruct agencies to use cost-benefit analysis when issuing new regulations. Paul R. Noe, a former Office of Information and Regulatory Affairs (OIRA) staff member during the George W. Bush administration, suggested that the next president could direct “agencies, including independent agencies, to reexamine their statutory interpretations ... and, 'unless prohibited by law,' implement those statutes through cost-benefit balancing.”



Read on:

- [Reform proposals related to judicial deference](#)

Review

What is deference?

The term deference refers to the administrative law principle by which courts are expected to defer to an agency's interpretation of a statute or regulation when the legislative language is silent or ambiguous. Deference is widely regarded as a major factor in the expansion of federal agency powers.

Types of deference:

- **Chevron deference:** A federal court defers to an agency's reasonable interpretation of an ambiguous statute.
- **Skidmore deference:** A federal court yields to a federal agency's interpretation of a statute administered by the agency according to the agency's ability to demonstrate persuasive reasoning.
- **Auer deference:** A federal court yields to an agency's reasonable interpretation of an ambiguous regulation that the agency itself has promulgated.

Deference arguments

- **Deference and agencies:** Supporters of deference claim that deference prevents non-expert judges from interfering with expert agency policy while opponents argue that deference contributes to the expansion of agency powers by concentrating unchecked lawmaking power in agencies and facilitating administrative collusion.
- **Deference and delegation:** Supporters of deference maintain that courts should defer to agency interpretations of congressionally delegated statutes while opponents argue that deference violates the nondelegation doctrine, creates a bias in favor of agencies, and prevents judicial review of agency actions.
- **Deference and the separation of powers:** Deference supporters claim that the separation of powers requires deference when the resolution of ambiguous statutes requires policy judgments while opponents maintain that deference violates the separation of powers by preventing the judicial branch from exercising independent judgment, transferring judicial power to the executive branch, and ignoring the judicial obligation to serve as a check on the political branches.
- **Deference and legal precedents:** Deference supporters contend that deference principles are supported by legal precedents and APA provisions while opponents argue that deference breaks with both United States Supreme Court precedent and the APA.

Deference in the states

Thirty-six states have implemented forms of judicial deference to state administrative agencies similar to the federal deference doctrines. Five states (Wisconsin, Florida, Arizona, Mississippi, and Michigan) have taken steps to limit or eliminate deference.

The future of deference

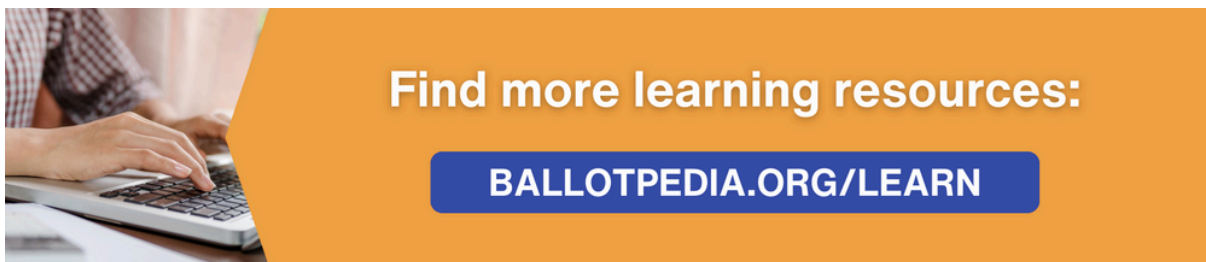
The United States Supreme Court has signaled a willingness to reexamine the scope of deference, contributing to a new period of uncertainty surrounding Chevron deference.

Deference reform proposals

Administrative law scholars and federal government actors have proposed a variety of methods to reform deference. Legislative proposals would statutorily limit or eliminate deference, judicial methods would primarily limit the scope of deference doctrines, and an executive approach would encourage the use of cost-benefit analysis in agency rule making.

Continued reading:

- ["Judicial Deference to Administrative Interpretations of Law" by Antonin Scalia \(1989\)](#)
- ["The Origins of Judicial Deference to Executive Interpretation" by Aditya Bamzai \(2017\)](#)



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